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IN THE UNITED STATES DISTRICT COURT

8  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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11 KIRK KEILHOLTZ and KOLLEEN KEILHOLTZ  
12 for themselves and on behalf of those  
similarly situated,

No. C 08-00836 CW  
ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS

13 Plaintiffs,

14 v.

15 LENNOX HEARTH PRODUCTS INC.; LENNOX  
16 INTERNATIONAL INC.; LENNOX INDUSTRIES  
and DOES 1 through 25, Inclusive,

17 Defendants.

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19 Plaintiffs' claims arise under the Unfair Competition Law  
20 (UCL), California Business & Professions Code § 17200; the Consumer  
21 Legal Remedies Act (CLRA), California Civil Code § 1750; and the  
22 doctrine of unjust enrichment. Defendants move to dismiss the UCL  
23 claim asserted by class members who own a home in which a fireplace  
24 was installed more than four years ago on the ground that such a  
25 claim is barred by the statute of limitations. Similarly,  
26 Defendants move to dismiss the CLRA and unjust enrichment claims  
27 asserted by class members who own a home in which a fireplace was  
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1 installed more than three years ago on the ground that such claims  
2 are barred by the statute of limitations. Defendants also move to  
3 dismiss the CLRA claim on the ground that Plaintiffs have not  
4 complied with the pre-litigation notice requirements of the CLRA.  
5 Plaintiffs oppose the motion. Having heard oral argument and  
6 considered all of the papers filed by the parties, the Court grants  
7 Defendants' motion.

8 BACKGROUND

9 On February 6, 2008, Plaintiffs filed this putative class  
10 action on behalf of themselves and all similarly situated persons  
11 who are the owners of homes in which Defendants' gas fireplaces are  
12 installed. According to Plaintiffs' second amended complaint  
13 (SAC), Defendants distributed and sold the gas fireplaces.

14 Plaintiffs allege that Defendants sold the fireplaces with the  
15 specific intention of having builders install them in homes  
16 throughout the United States. SAC ¶ 14. By selling the  
17 fireplaces, Defendants represented to consumers that they were  
18 "safe, of mercantile quality, and fit for their intended and  
19 reasonably foreseeable uses, and with sufficient protections and  
20 warnings regarding potential dangers and hazards which reasonable  
21 consumers would expect and assume to be provided in order to make a  
22 decision whether to purchase a home installed with [the fireplace]  
23 or purchase [a fireplace]." Id.

24 Plaintiffs further allege that Defendants failed to disclose  
25 or concealed the fact that the fireplaces are dangerous and unsafe  
26 given that the unguarded single pane glass-sealed front may reach  
27 temperatures in excess of 475 degrees Fahrenheit, which may cause

third degree burns to skin contacting the glass. *Id.* at ¶ 15.  
Lastly, Plaintiffs allege that because of Defendants' conduct and omissions in the last ten years, members of the putative class came to own residential homes in which the fireplaces were installed. *Id.* at ¶ 16.

On March 30, 2009, the Court granted in part Defendants' motion to dismiss the complaint. Plaintiffs were granted leave to amend and they filed a second amended complaint on June 1, 2009. On July 9, 2009, Defendants filed the instant motion to dismiss.

## LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

<sup>27</sup> In *Iqbal*, 129 S. Ct. at 1950, the Supreme Court laid out the

1 following methodological approach for assessing the adequacy of a  
2 plaintiff's complaint:

3 a court considering a motion to dismiss can choose to begin by  
4 identifying pleadings that, because they are no more than  
conclusions, are not entitled to the assumption of truth.  
While legal conclusions can provide the framework of a  
complaint, they must be supported by factual allegations.  
When there are well-pleaded factual allegations, a court  
should assume their veracity and then determine whether they  
plausibly give rise to an entitlement to relief.

7 A claim has facial plausibility "when the plaintiff pleads factual  
8 content that allows the court to draw the reasonable inference that  
9 the defendant is liable for the misconduct alleged." Id. at 1949.  
10 "The plausibility standard is not akin to a 'probability  
11 requirement,' but it asks for more than a sheer possibility that a  
12 defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at  
13 557). Determining whether a complaint states a plausible claim for  
14 relief is "a context-specific task that requires the reviewing  
court to draw on its judicial experience and common sense." Id. at  
15 1950.

17 Although the court is generally confined to consideration of  
18 the allegations in the pleadings, when the complaint is accompanied  
19 by attached documents, such documents are deemed part of the  
20 complaint and may be considered in evaluating the merits of a Rule  
21 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,  
22 1267 (9th Cir. 1987).

#### DISCUSSION

##### I. CLRA Notice Requirements

Under the CLRA, thirty days or more prior to the commencement  
of "an action for damages," the consumer shall notify the defendant

1 of the particular alleged violations of § 1770, and demand that the  
2 defendant correct, repair, replace, or otherwise rectify the goods  
3 or services alleged to be in violation of § 1770. Cal. Civ. Code  
4 § 1782(a). The notice must be in writing and must be sent by  
5 certified or registered mail, return receipt requested, to the  
6 place where the transaction occurred or to the person's principal  
7 place of business within California. Id. A "literal application  
8 of the notice provisions" is the only way to accomplish the CLRA's  
9 purposes. Outboard Marine Corp. v. Superior Court, 52 Cal. App. 3d  
10 30, 41 (1975).

11 Plaintiffs failed to give the pre-litigation CLRA notice  
12 before filing their original complaint. The Court dismissed the  
13 CLRA damages claim as premature, but granted Plaintiffs leave to  
14 amend their complaint to include this claim once the requisite  
15 notice had been provided. Plaintiffs so amended. Defendants now  
16 argue that Plaintiffs have not satisfied the notice requirement  
17 because the notice was mailed to addresses in Texas, not  
18 California.<sup>1</sup> Plaintiffs claim that they attempted to mail the  
19 notice to a California location, but no such location is on record  
20 with the California Secretary of State. However, Plaintiffs were  
21 aware that Defendant Lennox Hearth maintained a principal place of  
22 business in California, but they failed to send a notice to that  
23 address. Decl. K. Wolden ¶ 7. Moreover, although Defendant Lennox  
24 Industries does not have a principal place of business in  
25 California, it provided Plaintiffs with a California address to

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27 <sup>1</sup>The Court grants Defendants' request to take judicial notice  
of the April 1, 2009 notice sent to Defendants.

1 use. Id. at ¶ 6. Nevertheless, Plaintiffs did not mail their pre-  
2 litigation notice to that address either.

3 As noted above, the pre-litigation notice requirement must be  
4 literally applied and strictly construed. See Outboard Marine, 52  
5 Cal. App. 3d at 40-41; Cattie v. Wal-Mart Stores Inc., 504 F. Supp.  
6 2d 939, 950 (S.D. Cal. 2007). Nevertheless, the Court will grant  
7 Plaintiffs one last opportunity to comply with the pre-litigation  
8 requirement. If Plaintiffs do not comply with the requirement, the  
9 Court will dismiss their claim for damages under the CLRA.

10 II. Statute of Limitations

11 The parties agree that a three-year statute of limitations  
12 applies to the CLRA and unjust enrichment claims and a four-year  
13 statute of limitations applies to the UCL claim. However, the  
14 parties dispute whether the time limits should be tolled under the  
15 delayed discovery rule or, alternatively, under the principle of  
16 fraudulent concealment. If the time limits are not tolled,  
17 Plaintiffs' CLRA and unjust enrichment claims arising from a  
18 fireplace that was installed in a home more than four years ago and  
19 Plaintiffs' UCL claim arising from a fireplace that was installed  
20 in a home more than three years ago are barred.

21 A. Delayed Discovery Rule

22 Plaintiffs argue that their claims are based on allegations of  
23 failure to disclose, and that they are therefore covered by the  
24 delayed discovery rule.

25 Although generally a cause of action accrues when all of its  
26 elements accrue, the delayed discovery rule postpones accrual until  
27 the plaintiff discovers, or has reason to discover, the cause of  
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1 action. Grisham v. Philip Morris U.S.A., Inc., 40 Cal. 4th 623,  
2 741, 742 (2007). A plaintiff has reason to discover a cause of  
3 action when he or she "has reason at least to suspect a factual  
4 basis for its elements." Id. at 742. "Under the discovery rule,  
5 suspicion of one or more of the elements of a cause of action,  
6 coupled with knowledge of any remaining elements, will generally  
7 trigger the statute of limitations period." Fox v. Ethicon  
8 Endo-Surgery, Inc., 35 Cal. 4th 797, 806-807 (2005).

9 To invoke the delayed discovery rule, the plaintiff must plead  
10 facts showing: "(a) Lack of knowledge. (b) Lack of means of  
11 obtaining knowledge (in the exercise of reasonable diligence the  
12 facts could not have been discovered at an earlier date). (c) How  
13 and when he did actually discover the fraud or mistake." General  
14 Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir. 1991)  
15 (applying California law). Under this rule, when the plaintiff has  
16 information about circumstances that would put a reasonable person  
17 on inquiry notice, or has the opportunity to obtain knowledge from  
18 sources open to his or her investigation, the statute commences to  
19 run. Id.

20 The delayed discovery rule is typically employed when the  
21 defendant is in a far superior position to know of the act and the  
22 injury, and the act and the injury are difficult for the plaintiff  
23 to detect. Prudential Home Mortgage Co. v. Superior Court, 66 Cal.  
24 App. 4th 1236, 1246-47 (1998); Gryczman v. Pico Partners, Ltd., 107  
25 Cal. App. 4th 1, 5 (2003).

26 The delayed discovery rule does not apply to actions brought  
27 under the UCL. Snapp & Associates Ins. Servs., Inc. v. Robertson,

1 96 Cal. App. 4th 884, 891 (2002); Karl Storz Endoscopy America, Inc.,  
2 v. Surgical Technologies, Inc., 285 F.3d 848 (9th Cir. 2002).  
3 The Court will only consider whether it applies to Plaintiffs' CLRA  
4 and unjust enrichment claims.

5 Like Plaintiffs' original complaint, the SAC fails to plead  
6 sufficient facts regarding their lack of knowledge of Defendants'  
7 alleged fraud, lack of the means to discover the alleged fraud and  
8 how and when the alleged fraud was actually discovered.

9 Plaintiffs moved into their home in February, 2007 and they  
10 discovered the alleged danger of the fireplace in the winter of  
11 2007 when their dog was burned by the fireplace screen. Plaintiffs  
12 allege that no reasonable consumer could have contemplated, without  
13 a clear disclosure by Defendants, that they could be seriously  
14 burned by the fireplace screens "placed in family areas low enough  
15 to be touched by infants and small children and resembling many of  
16 the other home appliances that they knew to be heat generating yet  
17 safe to touch." SAC ¶ 17(m). Plaintiffs allege that the manner in  
18 which the fireplace was marketed and presented to them led them  
19 reasonably to rely upon the products as safe to use.

20 Plaintiffs argue that the delayed discovery rule applies to  
21 the unnamed class members whose fireplaces were installed within  
22 ten years prior to the date of the filing of this case. However,  
23 Plaintiffs do not address whether the experiences of those unnamed  
24 class members are similar to their own. If their experiences were  
25 similar, then these class members would have discovered the facts  
26 giving rise to their claims within a year of moving into their  
27 homes, which is well within the applicable statute of limitations.

1 Thus, the SAC supports the proposition that all unnamed class  
2 members were capable of determining that their fireplaces were  
3 dangerous within the limitations period. Accordingly, Plaintiffs  
4 have not met their burden to allege facts to support a plausible  
5 inference that the class members who had a fireplace installed more  
6 than three years ago for the CLRA and unjust enrichment claims and  
7 more than four years ago for the UCL claims lacked knowledge of  
8 those claims.

Moreover, class members with time-barred claims had "notice or information of circumstances to put a reasonable person on inquiry or . . . the opportunity to obtain knowledge open to [] investigation . . . ." General Bedding, 947 F.2d at 1397. Class members had obvious access to their fireplaces, which emitted significant amounts of heat. Therefore, simply by using their fireplaces, they had an opportunity to obtain knowledge "from sources open to [] investigation." Id. Also, a tag near the pilot light and a customer care manual included warnings about the high surface temperature of the fireplace.<sup>2</sup> Plaintiffs allege that these warnings were inadequate because the tag was located "under the bowels of the unit" and the warning in the manual was located two to four pages into the manual. SAC ¶ 17(i). The Court

23           <sup>2</sup>The tag states, "Caution: Hot while in operation. Do not  
24 touch. Severe burns may result. Keep children, clothing,  
25 furniture, gasoline and other liquids having flammable vapors  
26 away." The manual provides, "WARNING! Children and adults should  
27 be alerted to the hazards of high surface temperatures. Use  
caution around the appliance to avoid burns or clothing ignition.  
Young children should be carefully supervised when they are in the  
same room as the appliance. Note: An optional screen panel for the  
glass is available (see page 14 for ordering information)."  
(Emphasis in original.)

1 concludes that these warnings, combined with significant heat  
2 exposure that any fireplace user would have experienced,  
3 sufficiently put a reasonable person on inquiry notice of the  
4 claim.

5 Lastly, Plaintiffs have not adequately alleged how and when  
6 the class members with time-barred claims discovered the alleged  
7 fraud. Therefore, the Court concludes that Plaintiffs have not  
8 sufficiently plead facts to support an application of the delayed  
9 discovery rule.

10       B. Fraudulent Concealment Doctrine

11       "A close cousin of the discovery rule is the well accepted  
12 principle of fraudulent concealment." Bernson v. Browning-Ferris  
13 Indus. of California, Inc., 7 Cal. 4th 926, 931 (1994). "The rule  
14 of fraudulent concealment is applicable whenever the defendant  
15 intentionally prevents the plaintiff from instituting suit . . ."  
16 Id. at 931, n.3. "In order to establish fraudulent concealment,  
17 the complaint must show: (1) when the fraud was discovered; (2) the  
18 circumstances under which it was discovered; and (3) that the  
19 plaintiff was not at fault for failing to discover it or had no  
20 actual or presumptive knowledge of facts sufficient to put him on  
21 inquiry." Baker v. Beech Aircraft Corp., 39 Cal. App. 3d 315, 321  
22 (1974). "In urging lack of means of obtaining knowledge, it must  
23 be shown that in the exercise of reasonable diligence the facts  
24 could not have been discovered at an earlier date." Id.

25       For the reasons described above, Plaintiffs' SAC fails to  
26 allege when the fraud was discovered by class members who have  
27 time-barred claims, the circumstances under which it was

1 discovered, and that they were not at fault for failing to discover  
2 it or had no actual or presumptive knowledge of facts sufficient to  
3 put them on inquiry. Plaintiffs therefore fail to allege  
4 sufficient facts to invoke tolling based on fraudulent concealment.

5 Plaintiffs' CLRA claims arising outside of the three-year  
6 statute of limitations, UCL claims arising outside of the four-year  
7 statute of limitations, and unjust enrichment claims arising  
8 outside of the three-year statute of limitations are dismissed.

9 CONCLUSION

10 For the foregoing reasons, the Court grants Defendants' motion  
11 to dismiss without leave to amend. Plaintiffs have previously been  
12 granted leave to amend and have failed to add the requisite  
13 particularity to their claims.

14 IT IS SO ORDERED.

15  
16 Dated: 9/8/09

*Claudia Wilken*

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17 CLAUDIA WILKEN  
United States District Judge

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